No. 75-1615

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OCTOBER TERM, 1975

UTAH CAPITAL CORPORATION, ET AL., PETITIONERS

v.

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA (SECURITIES AND EXCHANGE COMMISSION, ET AL., REAL PARTIES IN INTEREST)

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION IN OPPOSITION

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OPINIONS BELOW

Neither the court of appeals nor the district court rendered an opinion.

JURISDICTION

The order of the court of appeals was entered on March 24, 1976 (Pet. Ex. C). The petition for a writ of certiorari was filed on May 5, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals properly denied a writ of mandamus to compel the district court to dismiss the complaint for lack of venue and personal jurisdiction.

STATUTES INVOLVED

Section 27 of the Securities Exchange Act of 1934, 48 Stat. 902, as amended, 15 U.S.C. 78aa, provides in pertinent part:

> Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by this title or rules and regulations thereunder, or to enjoin any violation of such title or rules and regulations, may be brought in any such district or in the district wherein the defendant is found or is an inhabitant or transacts business, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found.

Section 22(a) of the Securities Act of 1933, 48 Stat. 86, as amended, 15 U.S.C. 77v, provides in pertinent part:

> Any such suit or action may be brought in the district wherein the defendant is found or is an inhabitant or transacts business, or in the district where the offer or sale took place, if the defendant participated therein, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found.

STATEMENT

The Securities and Exchange Commission instituted this injunctive action in the United States District Court for the Northern District of California against Blazon

Corporation ("Blazon"), petitioner Utah Capital Corporation ("UCC"), a major shareholder of Blazon, two officers and directors of Blazon, and petitioner Glenn W. McMurray, a director of Blazon and an officer and director of UCC.[1] The complaint alleged that in connection with the offer for sale, sale and purchase of Blazon securities, the five defendants, "singly and in concert," violated the registration and antifraud provisions of the federal securities laws, in violation of Sections 5(a) and (c) and 17 (a) of the Securities Act of 1933, 48 Stat. 77, 84, amended, 15 U.S.C. 77e(a) and (c), and 77q(a), and Section 10(b) of the Securities Exchange Act of 1934, 48 Stat. 891, 15 U.S.C. 78j(b), and the Commission's Rule 10b-5 thereunder, 17 C.F.R. 240.10b-5.

The violations charged related to alleged misrepresentations and failure to state necessary facts in a notification of intention to sell the securities and an offering circular, which Blazon filed under the Commission's Regulation A with the San Francisco branch office of the Commission, and in amendments to the circular also filed in that office.[2] The Commission alleged that petitioner McMurray

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[1]Blazon, an Arizona corporation, proposed to engage in the business of purchasing and developing Arizona real estate and presently is engaged in the manufacture of recreational vehicles. Petitioner UCC, a Utah corporation, is a small business investment company with offices in Salt Lake City, Utah. Petitioner McMurray is a resident of Mountain Home, Idaho (Pet. 3-4).

[2]Regulation A, promulgated pursuant to Section 3(b) of the Securities Act of 1933, 48 Stat. 76, as amended, 15 U.S.C. 77c(b), provides a conditional exemption from the registration provisions of the Act for securities offerings by the issuer if the aggregate offering price does not exceed $500,000. 17 C.F.R. 230.254(a). Regulation A requires, *inter alia*, that at least ten days prior to the offering of any securities, a notification be filed with the Regional Office of the

and the other Blazon directors had authorized the filing of those documents with the Commission.

After the district court had entered a preliminary injunction (Pet. Ex. A), petitioners moved to dismiss the action on the grounds, *inter alia*, of improper venue and lack of personal jurisdiction.[3] The district court denied the motion (Pet. Ex. B). Petitioners then sought a writ of mandamus from the court of appeals, requesting that it compel the district court to dismiss the action on grounds of improper venue, lack of personal jurisdiction, and denial of due process. The court of appeals denied the petition, holding that "[m]andamus is not a proper substitute for appeal" (Pet. Ex. C).

ARGUMENT

1. The court of appeals properly declined to issue a writ of mandamus to compel the district court to dismiss the action on the grounds of improper venue and lack of personal jurisdiction. An order declining to dismiss an action on those grounds is interlocutory, and is reviewable

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Commission "for the region in which the issuer's principal business operations are conducted or proposed to be conducted * * *." *Id.* at 230.255(c). Any amendments to that notification must be filed with the same Regional Office as the original notification. *Id.* at 230.255(d). No written offer of securities may be made under Regulation A unless an offering circular, containing certain specified information, is provided to the offeree concurrently with or prior to the time the offer is made. *Id.* at 230.256(a). The offering circular and any amendments thereto must be filed with the appropriate Regional Office at the same time as the notification. *Id.* at 230.256(f).

[3]Petitioners concede (Pet. 11) that they were personally served with a summons and a copy of the complaint in July 1975.

only in connection with an appeal from the final judgment in the case. As the court of appeals ruled, the extraordinary writ of mandamus "is not a proper substitute for appeal" (Pet. Ex. C).

In *Kerr* v. *United States District Court*, No. 74-1023, decided June 14, 1976, this Court once again reiterated that mandamus is a drastic remedy to be used only in unusual situations. " '[O]nly exceptional circumstances amounting to a judicial "usurpation of power" will justify the invocation of this extraordinary remedy.' " *Id.*, slip op. at 8, quoting from *Will* v. *United States*, 389 U.S. 90, 95. Before the writ may issue, the party seeking it must demonstrate that he has "no other adequate means to attain the relief he desires" and must discharge "the burden of showing that [his] right to issuance of the writ is 'clear and indisputable'" (slip op. at 9).

Petitioners did not make such a showing in this case. There was no "usurpation of power" by the district court when it declined to dismiss the suit; at most, petitioners' claim is that the district court erred in applying the venue and jurisdictional provisions involved. Contrary to petitioners' assertion (Pet. 15), the All Writs Act (28 U.S.C. 1651(a)) does not permit review upon an extraordinary writ merely because the interlocutory ruling sought to be reviewed relates to jurisdiction. See *Roche* v. *Evaporated Milk Assn.*, 319 U.S. 21, 26; *Gulf Research & Development Co.* v. *Leahy*, 193 F. 2d 302 (C.A. 3); cf. *Ex parte Chicago, Rock Island & Pacific Railway*, 255 U.S. 273; *In re Atlantic City Railroad*, 164 U.S. 633. Petitioners' challenges to the jurisdiction of the district court and the venue of the action can be fully reviewed upon any appeal they may take from any final judgment that is adverse to them.

2. In any event, the district court correctly declined to dismiss the action for lack of venue and personal jurisdiction.

a. Section 27 of the Securities Exchange Act of 1934, 48 Stat. 902, as amended, 15 U.S.C. 78aa, authorizes the Commission to bring suit to enjoin any violation of the Act "in [any] district wherein any act or transaction constituting the violation occurred * * * or in the district wherein the defendant is found or is an inhabitant or transacts business." See *Radzanower* v *Touche Ross & Co.*, No. 75-268, decided June 7, 1976, slip op. 2. Under this provision, venue lies in any district in which a single act or transaction that is important to the violation occurred *E.g., Hooper* v. *Mountain States Securities Corp.*, 282 F. 2d 195, 204-205 (C.A. 5), certiorari denied, 365 U.S. 814; *Errion* v. *Connell*, 236 F. 2d 447 (C.A. 9); *Prettner* v. *Aston*, 339 F. Supp. 273, 280 (D. Del.).

The filing of the Regulation A notification and the offering circular and the amendments thereto were integral parts of the marketing of the Blazon securities, and contained the misrepresentations and omissions constituting the violations charged.[4] Since these documents were filed with the Commission office located in the

[4]The fact that the filing of the notification and offering circular were integral parts of the marketing scheme in which the violations occurred distinguishes the cases petitioners cite (Pet. 8-9), holding that the mere transmittal of documents that are incidental to the alleged violation is not sufficient to establish venue in the district in which the documents are received. Cf. *Getter* v. *R. G. Dickinson & Co.*, 366 F. Supp. 559 (S.D. Iowa). *Goldberg* v. *Touche Ross & Co.*, 390 F. Supp. 290 (S.D. N.Y.), upon which petitioners rely (Pet. 8-9), held only that the mailing of a document into that district did not establish venue as to the particular named plaintiff, who had had no contacts with that forum.

Northern District of California, venue of this action lay in that district. See *Hooper* v. *Mountain States Securities Corp., supra; United States* v. *Natelli*, 527 F. 2d 311, 326 (C.A. 2), certiorari denied, April 19, 1976, No. 75-808; *Securities and Exchange Commission* v. *National Student Marketing Corp.*, 360 F. Supp. 284, 293 (D. D.C.); cf. *Investors Funding Corp. of New York* v. *Jones*, 495 F. 2d 1000, 1003 (C.A. D.C.).[5]

Furthermore, in a multi-defendant securities fraud action such as this, any material act in furtherance of an allegedly fraudulent scheme committed by any defendant gives the district in which the act was committed venue over all defendants who knowingly participated in that scheme, wherever they may be. *E.g., Wyndham Associates* v. *Bintliff*, 398 F. 2d 614, 620 (C.A. 2), certiorari denied, 393 U.S. 977; *Securities and Exchange Commission* v. *National Student Marketing Corp., supra*, 360 F. Supp. at 292; *Zorn* v. *Anderson*, 263 F. Supp. 745, 748 (S.D. N.Y.). Thus, venue was proper in the Northern

[5]Similarly, under 18 U.S.C. 3237(a), the general venue provision for continuing offenses, which specifically governs any offense involving the use of the mails, the lower federal courts consistently have held that venue lies in the district in which false statements in violation of federal statutes are filed, as well as in the district where they were prepared. See *United States* v. *Slutsky*, 487 F. 2d 832, 838-839 (C.A. 2), certiorari denied, 416 U.S. 937; *United States* v. *Bithoney*, 472 F. 2d 16, 21-24 (C.A. 2), certiorari denied, 412 U.S. 938; *United States* v. *Ruehrup*, 333 F. 2d 641 (C.A. 7), certiorari denied, 379 U.S. 903; *Imperial Meat Co.* v. *United States*, 316 F. 2d 435, 440 (C.A. 10), certiorari denied, 375 U.S. 820; *Henslee* v. *United States*, 262 F. 2d 750 (C.A. 5), certiorari denied, 359 U.S. 984.

District of California with respect to petitioners McMurray and UCC, who allegedly were knowing participants in and beneficiaries of Blazon's fraudulent scheme.[6]

b. As long as the particular district has venue over the action, the defendants may be served under Section 27 of the Securities Exchange Act of 1934 "wherever [they] may be found." *Wilko* v. *Swan*, 346 U.S. 427, 431. Since, as we have shown, the venue of this action was properly laid in the Northern District of California, the district court obtained personal jurisdiction over the petitioners by the service upon them of a summons and complaint (see n. 3, *supra*), even though such service was made outside the district.

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[6]Petitioners also contend (Pet. 6) that venue is improper under the narrower standard specified in Section 22 of the Securities Act of 1933, 48 Stat. 86, as amended, 15 U.S.C. 77v, because the complaint did not allege that any offer or sale of Blazon securities occurred in the Northern District of California. But since venue was proper under the Securities Exchange Act and the alleged violations of the Securities Act arose out of the same transactions as those violations, venue also was proper under the latter statute. See, *e.g.*, *Securities and Exchange Commission* v. *National Student Marketing Corp.*, *supra*, 360 F. Supp. at 291; *B & B Investment Club* v. *Kleinert's, Inc.*, 391 F. Supp. 720, 728 (E.D. Pa.); *Securities and Exchange Commission* v. *Memory Magnetics International*, 310 F. Supp. 949 (C.D. Cal.); *Zorn* v. *Anderson*, *supra*, 263 F. Supp. at 747. Petitioners' reliance (Pet. 7, 8) on *Rosenberg* v. *Globe Aircraft Corp.*, 80 F. Supp. 123 (E.D. Pa.), is misplaced, since that cause of action arose exclusively under the Securities Act of 1933.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1976.